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In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-243.

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, AND KEVIN McCARTHY,
APPELLANTS,
v.
COMMONWEALTH OF VIRGINIA,
APPELLEE.
(AND TWO COMPANION CASES.)

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA.

Reply Brief of Appellants to Appellees' Motion to Dismiss.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA.

Reply Brief of Appellants to Appellees' Motion to Dismiss.

I. The Constitutional Question Presented — When, If Ever May An Entire Criminal Trial Be Closed — Is Substantial And Requires Immediate Resolution.

Expressly and exclusively on the authority of Va. Code § 19.2-266, the Hanover County Circuit Court excluded the public and press from the 1978 murder trial of John Paul Ste-

venson, acting solely on speculations that the presence of observers in the courtroom might be "distracting" to the jury, that observers and prospective witnesses might talk to each other during recesses, that information about the trial might reach persons who might be called as prospective jurors in the event of a retrial, or the catch-all — that any conceivable risk of mistrial or retrial should be eliminated through the "precautionary" expedient of a secret trial.[1] The government not only acquiesced in the closing of Stevenson's trial on these grounds and accepted the trial court's conclusion that § 19.2-266 fully authorized the closure order,[2] but also urged the same before the Virginia Supreme Court on appeal.[3]

Despite the vague and unbounded authority conferred on Virginia trial courts by § 19.2-266, despite the statute's use to hold a secret trial on a vision of dangers lacking any basis in reality — let alone any showing of imminent, unavoidable prejudice — and despite the statute's invocation with no consideration of readily available alternative measures short of secrecy,[4] the government and court below nevertheless can

[1] *See* Jurisdictional Statement ("J.S."), Appendices D and E.

[2] *Id.* at 7a, 16a.

[3] *See* Brief in Opposition to Petition for Appeal ("Opposition to Appeal") at 5-7; Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition ("Opposition to Writs") at 3, 10, 15-17.

[4] In its Motion to Dismiss ("Motion"), the government several times points out that newspaper reports following two of the Stevenson retrials publicized the existence of "highly prejudicial but inadmissible evidence" introduced by the prosecution at the first trial. *E.g.*, Motion at 13 n.9. Although the government does not say so directly, its logic implies that a secrecy order should have been entered at an even earlier stage of the case than occurred here — perhaps covering the very first trial and continuing through the appellate proceedings in which the Virginia Supreme Court first held the government's evidence inadmissible. Needless to say, following the government's rationale would require the closing of all criminal proceedings (and even the impounding of all tape recordings and transcripts) until every direct and collateral route of review and retrial had been thoroughly and finally exhausted. Such a rule is obviously unthinkable — and plainly unnecessary.

conclude that Va. Code § 19.2-266 "obviously does not vest the state judge with unbridled discretion to close criminal trial proceedings."[5] That both the government and the court

[5] Motion at 10. In acknowledging to this Court that closure orders should be "reserved for extreme and unusual circumstances," *id.* at 11, the government all but concedes the unconstitutionality of the statute's sweeping mandate. Yet the government ardently defended the closure of Stevenson's trial below, and persists in maintaining that the trial court's closure order — certainly entered under circumstances neither extreme nor unusual — was both constitutional and fully authorized by Va. Code § 19.2-266. Given the government's insistence that the closure of Stevenson's trial pursuant to § 19.2-266 was not simply authorized but was actually "justified," Opposition to Writs at 17, it is small comfort to learn that the Attorney General's Office may seek amendments to § 19.2-266 to conform the statute to its view of justifiable closure orders. Motion at 2 n.1. Even a regime under which orders closing entire trials are supposedly "reserved for extreme and unusual circumstances," *id.* at 11, would offend the Constitution, for less drastic means than secrecy will always be at hand to assure the fair conduct of a trial — at least after the jury has been impanelled. Moreover, the government's actual commitment even to the regime it espouses is belied both by its unqualified defense of the closure order in this case, and by its apparent belief that transcripts and tape recordings of secret trials are acceptable substitutes for open proceedings. Motion at 12 n.8. In any event, because the Virginia Supreme Court relied on *Gannett* to support its implicit treatment of the entire press and public as "persons whose presence would impair the conduct of a fair trial," Va. Code § 19.2-266, it seems likely that, as long as the judgments below stand, trial courts in Virginia will consider any genuine legislative curtailment of § 19.2-266 void as an infringement of the defendant's "fair trial" right, as simply codified by § 19.2-266.

Of course, no possibility of mootness can arise, nor does the Attorney General even suggest such a possibility, where the "proposed amendments" to which he refers, Motion at 2 n.1, have not yet been drafted — much less enacted — and the nature of the "guidance" he says they will offer, *id.*, remains unknown. Certainly the Attorney General's claim that the order closing Stevenson's trial was "justified," Opposition to Writs at 17, betokens no eagerness to withhold consent to motions for closure in the event that trial judges fail to follow such new statutory "guidance" — whatever it may be. The Attorney General nowhere suggests that consent to closure motions will be sparingly granted — and no such suggestion of voluntary abstinence would in any event suffice to moot this case, *United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968), especially in view of

below consider *Gannett Co., Inc.* v. *DePasquale*, 99 S.Ct. 2898 (1979), such conclusive authority for their position that its mere citation should suffice below and command summary dismissal here itself demonstrates the immediate need for this Court to clarify — and, we submit, strictly confine — the meaning of *Gannett*.

II. This Case Is Properly Before This Court On Appeal.

The government would have this Court, on jurisdictional grounds, avoid reaching the merits of this appeal. In essence, the government contends that appellants, in the rush of proceedings below, did not explicitly enough voice their constitutional objections to Va. Code § 19.2-266, both on its face and as applied, to ask this Court to review the judgment below under 28 U.S.C. § 1257(2). The government's contention is without merit.[6]

The transcript of proceedings in the trial court unmistakably shows that, with the government's unquestioning assent, the trial judge entered his closure order on the sole authority of § 19.2-266 — over the constitutional objections vigorously

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the First Amendment rights at stake. This Court does not shrink from deciding constitutional issues on the hope that "[w]ell-intentioned prosecutors," *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964), will resolve constitutional ambiguities "in favor of adequate protection of First Amendment rights." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

[6]Intriguingly, on the one hand, the Attorney General insists that the court below did not construe Va. Code § 19.2-266 as authorizing the closure of Stevenson's trial, Motion at 10; on the other hand, the Attorney General reveals an intention to react to what the court below did by proposing "amendments" to Va. Code § 19.2-266 "to provide additional statutory guidance for state judges" on the subject of closure orders. Motion at 2 n.1.

asserted by appellants there and reiterated here.[7] It cannot be denied that the trial court's action fell within the literal terms of Va. Code § 19.2-266. Nor has the government ever suggested any particular narrowing construction of § 19.2-266 that would have rendered lawless the trial closing in this case or would align the statute with constitutional standards.[8] Before the Virginia Supreme Court, the government cited § 19.2-266 as sole and dispositive authority for the trial court's closure order[9] — and it was in this context that appellants un-

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[7]*See, e.g.*, Petition for Appeal at 6; J.S. at 6-7. To assert that the trial judge "made general reference to his statutory authority to exclude persons from the courtroom when he initially entered the closure order," Motion at 8 n.5, is to understate the case considerably. Upon entering his closure order in response to defense counsel's request "that everybody be excluded from the Courtroom," J.S. at 7a, the trial judge opined that "the *statute* gives me that power *specifically*," *id.* (emphases added), and cited no other source of authority for closing the trial. When the trial judge several hours later declined to vacate the closure order despite appellants' constitutional objections, he again invoked no other source of authority for closing the trial — although he did note that the exercise of such authority seemed appropriate if the trial judge "feel[s] that the . . . rights of the defendant are infringed in any way then . . . he makes the motion . . . and . . . it doesn't completely override the rights of everyone else." *Id.* at 16a. In context, the trial court was obviously ruling that the authority conferred by Va. Code § 19.2-266 — to order complete closure on defense motion — was a proper and constitutional means of avoiding even arguable infringements of the defendant's "fair trial" rights, so long as various unspecified rights of unidentified third parties are not "completely overrid[den]" by the exercise of that authority.

[8]It is therefore immaterial that "the Virginia Supreme Court did not define the terms of and [expressly] interpret the statute," Motion at 11, since no narrowing construction consistent with the Attorney General's position that the closure order in this case was "justified," see n.4 *supra*, could possibly have stripped from this statute the constitutionally objectionable power of wholesale trial closure on which this appeal rests.

[9]Again seeking to minimize "the degree of involvement of the statute," Motion at 10, the Attorney General notes only that the statute "was cited . . . in [the] brief in opposition to the appeal, for the proposition that state law allowed a judge in his discretion to exclude persons from the courtroom whose presence would impair the conduct of a fair trial." *Id.* at 8 n.5. In

ambiguously asserted their constitutional objections before the Virginia Supreme Court.[10]

In rejecting those objections, the court below obviously and necessarily decided the constitutionality of Va. Code § 19.2-266, both on its face and as applied.[11] "That is sufficient under [this Court's] practice." *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974). *Cf. Eureka Lake & Yuba Canal Co.* v. *Superior Court*, 116 U.S. 410, 415-416 (1886); *Furman* v. *Nichol*, 75 U.S. (8 Wall.) 44, 55-56 (1868). The jurisdictional requirement of 28 U.S.C. § 1257(2) calls "not for some abracadabra," *Flournoy* v. *Wiener*, 321 U.S. 253, 264-265 (1944) (Frankfurter, J., dissenting), but demands instead a commonsense assessment of the questions presented to the court below in express terms and by necessary implication. And the decision of the court below warrants precisely the same form of analysis. *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63 (1928). *See Braniff Airways, Inc.* v. *Nebraska State Board*, 347 U.S 590, 599 (1954); *Cissna* v. *Tennessee*, 246 U.S 289, 293-294 (1918).

The Virginia Supreme Court could scarcely mistake the object of appellants' constitutional attack. Since Stevenson's trial had ended, an order admitting appellants to the trial would obviously be of no use — as the court below was forcefully reminded by the government itself.[12] Only a judgment invalidating the statute on its face or as applied could furnish a remedy — for it was the statute which remained to threaten appellants with the "recurrent phenomenon"[13] of orders closing criminal trials. Thus any ruling by the court below inescapably determined the constitutionality of Va. Code § 19.2-266; as Chief Justice Marshall said in an analogous context:

> The defendants in error deny the jurisdiction of this Court, because, they say, the record does not show that

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fact, the statute was the *only* source of authority cited in that brief, and it was cited as support not only for selectively or temporarily excluding particular persons *but as authority for expelling all observers*. Opposition to Appeal at 5, 7. Similarly, the Attorney General suggests that the statute was cited only parenthetically in the Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition. Motion at 8 n.5. In fact, however, the statute was the *only* authority in state law for the closure order cited in that Opposition, and the statute was there cited for the central proposition that mandamus would not lie inasmuch as the trial judge was to act, according to the statute, "in his discretion." Opposition to Writs at 3. *See id.* at 17.

[10] *See* Petition for Appeal and Memorandum in Support of Petitions for Writs of Mandamus and Prohibition ("Petition for Appeal") at 6.

[11] The Attorney General asserts that "Virginia procedure requires that constitutional challenges to state statutes be made in the trial court," Motion at 8, citing *King* v. *Commonwealth*, 219 Va. 171, 247 S.E. 2d 368 (1978) (per curiam); *Rice* v. *Commonwealth*, 212 Va. 778, 188 S.E. 2d 196 (1972). But unlike the accused in *King*, who evidently claimed no violation of his constitutional rights at trial, 219 Va. at 173, 247 S.E. 2d at 370, and unlike the Commonwealth in *Rice*, which raised its constitutional claim for the first time on appeal, 212 Va. at 779, 188 S.E. 2d at 197, appellants here vigorously asserted their constitutional objections to the closure order entered by the trial court pursuant to § 19.2-266 *during the trial*. J.S. at 9a-19a. *See Reid* v. *Baumgardner*, 217 Va. 769, 773, 232 S.E. 2d 778, 780 (1977) (purpose of requirement that ground of objection be specified is to give trial court opportunity to rule intelligently, and failure to specify ground of objection will be overlooked on appeal if trial judge could hardly have failed to comprehend reason why it was interposed). Moreover, notwithstanding *King* and *Rice*, the Virginia Supreme Court by its own Rule 5:21 provides that even an objection not timely asserted below — or asserted without specifying the ground of the objection — will nonetheless be entertained on appeal "to enable this Court to attain the ends of justice." The Virginia Supreme Court does not insist unwaveringly that the grounds of an objection be stated with specificity at trial "where the character of the objection is perfectly patent." *Solomon* v. *Atlantic Coast Railroad Co.*, 187 Va. 240, 243, 46 S.E. 2d 369, 370 (1948); *Smith* v. *Commonwealth*, 165 Va. 776, 781, 182 S.E. 124, 127 (1935).

In any event, a state court's power deliberately to blind itself to a federal constitutional claim necessarily presented by a pending case would itself be open to serious challenge. *Cf. Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 233-234 (1969); *Henry* v. *Mississippi*, 379 U.S. 443, 446-448 (1965).

[12] Opposition to Writs at 3-4.

[13] Petition for Appeal at 48.

the constitutionality of the act of the legislature, under which the plaintiff claimed to support his action, was drawn into question.

Undoubtedly the plea might have stated in terms that the act . . . was repugnant to the Constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state Court. That question must have been discussed and decided.

The plaintiffs sustain their right . . . by the act of assembly. Their declaration is founded upon that act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the act of assembly.

Wilson v. *Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 249 (1829).[14] It is § 19.2-266, construed by the court below to

[14]Nor would any purpose be served by adopting the government's jurisdictional argument. *See* Motion at 6-9. Undeniably, the rule requiring clear presentation of constitutional attacks on state statutes serves salutary purposes, weeding out cases of purely lawless action, cases where statutes may readily be interpreted consistent with constitutional requirements, and cases where effective remedies are available short of invalidating a statute on its face or as applied. But none of these purposes is involved or furthered here. Contrast, *e.g.*, *Raley* v. *Ohio*, 360 U.S. 423, 434-435 (1959), dismissing an appeal but granting certiorari and reversing as violative of due process convictions for refusing to testify before a commission whose chairman had assured witnesses that the privilege against self-incrimination could be invoked as a basis for refusing to testify. Although the state supreme court in *Raley* had relied on an immunity statute to hold that no privilege of self-incrimination was available on these facts, the validity of that statute had not been challenged in the state courts, and simply reversing the conviction on due process grounds was entirely consistent with leaving the immunity statute intact both on its face and as applied.

authorize secret trials virtually on a whim, that poses a continuing threat to the rights of appellants and the public they represent. Only if this Court invalidates § 19.2-266 at least as applied here will that threat be removed and "the constitutional right of the press and public to access," *Gannett*, *supra*, 99 S.Ct. at 2916 (Powell, J., concurring), be restored.[15]

III. This Case Is Also Properly Before This Court On Certiorari.

There can be no doubt that the judgments of the court below are properly reviewable in this Court not only by appeal under 28 U.S.C. § 1257(2), but also by certiorari under 28

[15]In any event, an appeal would be proper even without the statute — since the combined effect of the trial court's order and the Virginia Supreme Court's judgments denying relief was not simply the resolution of a dispute between the parties in this litigation, or even simply the creation of a precedent for future disputes, but the establishment and enforcement of a statewide *rule of court* having the force of law in Virginia, *see* nn.16-19 *infra*, under which a defense motion unopposed by the prosecution easily suffices to shroud a full trial in secrecy. Accordingly, appellants' complaint is not simply that their constitutional rights have been violated, but that the *regime of judicial administration* put in place by the Virginia courts, pursuant to an undeniably broad reading of Va. Code § 19.2-266, has caused, and continues to threaten, serious infringement of appellants' constitutional rights of access to criminal trials. A federal constitutional challenge to such a statewide rule of court, unambiguously made but decisively rejected below, properly reaches this Court on appeal under 28 U.S.C. § 1257(2). *See*, *e.g.*, *Lathrop* v. *Donohue*, 367 U.S. 820, 824-825 (1961) (rule established by state supreme court may be statute within meaning of § 1257(2) even absent delegation of authority by legislature to establish the rule); *Mayer* v. *City of Chicago*, 404 U.S. 189, 191-193 & n.2 (1971) (rule established by court under broad legislative delegation of authority to amend statutory provisions governing criminal appeals held to be statute under § 1257(2)); *In re Griffiths*, 413 U.S. 717, 718 (1973) (rules promulgated by judges and administered by state bar are statutes within the meaning of § 1257(2)).

U.S.C. § 1257(3). *See* 28 U.S.C. § 2103. In "[f]inding no reversible error," J.S. at 1a, and thus refusing appellants' petition for appeal on the authority of *Gannett*, J.S. at 1a, the court below rendered a final judgment on the merits having the binding force of statewide precedent.[16] That ruling

[16]The Virginia Supreme Court has emphasized that the effect of a refusal of a petition for appeal "is to affirm the decree of the . . . circuit court." *Harris* v. *Battle*, (Jan. 27, 1954) (unreported opinion), reprinted in Jurisdictional Statement at 14, *Harris* v. *Battle*, 348 U.S. 803 (1954) (per curiam) (noting probable jurisdiction to review decision by Virginia Supreme Court refusing petition for appeal). *See Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (granting certiorari to review decision of Virginia Supreme Court refusing petition for appeal). See also n.17, *infra*. In Virginia, "[the] denial of an appeal acts as a judgment on the merits." A. Vanderbilt, *Minimum Standards of Judicial Administration* 399 (1949). "[A] decision to deny a petition is in reality a decision on the merits in that it represents an affirmance of the decision below." Report of the Appellate Justice Project of the National Center for State Courts 1972-1973, *The Appellate Process and Staff Research Attorneys in the Supreme Court of Virginia* 56 (1974), cited with approval in *Saunders* v. *Reynolds*, 214 Va. 697, 700-702, 204 S.E. 2d 421, 424 (1974) ("We state unequivocally that a decision to grant or refuse a petition for writ of error is based upon one equally-applied criterion — the merits of the case.").

Decisions by the Virginia Supreme Court refusing petitions for appeal or dismissing writs of error accordingly carry the binding force of statewide precedent. *E.g.*, *Cheatham* v. *Taylor*, 148 Va. 26, 138 S.E. 545 (1927) (appeal) (noting that court explains its decisions refusing petitions for appeal or dismissing writs of error in "exceptional cases" involving "main question" of "supposed novelty"); *Jones* v. *Kirby*, 146 Va. 109, 135 S.E. 676 (1926) (appeal); *Allen* v. *Commonwealth*, 114 Va. 826, 77 S.E. 66 (1913) (error); *McCue* v. *Commonwealth*, 103 Va. 870, 1001, 49 S.E. 623, 629 (1905) (error) (construing statute to apply to criminal as well as to civil proceedings). *See Mid-State Equipment Co., Inc.* v. *Bell*, 217 Va. 133, 141, 225 S.E. 2d 877, 884 (1976) (following *Cheatham*); *McCotter* v. *Carle*, 149 Va. 584, 590, 140 S.E. 670, 672 (1927) (*Jones*); *Henry* v. *Commonwealth*, 195 Va. 281, 294, 77 S.E. 2d 863, 870 (1953) (*Allen*); *Tate* v. *Commonwealth*, 155 Va. 1016, 1024, 154 S.E. 508, 511 (1930) (*McCue*) (construction of statute). Federal courts also rely on decisions of the Virginia Supreme Court refusing petitions for appeal or dismissing writs of error, *e.g.*, *Case* v. *Morisette*, 475 F. 2d 1300, 1308 & n.46, 1311 n.60 (D.C. Cir. 1973) (*Cheatham*); *DeMaurez* v. *Swope*, 104 F. 2d 758, 759 (9th Cir. 1939) (*McCue*), as do other state courts. *E.g.*, *Bouley* v. *City of Nashua*, 106 N.H. 74, 79, 205 A. 2d 34, 37 (1974) (*Cheatham*); *State* v. *Lilja*, 155 Minn. 251, 255, 193 N.W. 178, 180 (1923) (*Allen*); *People* v. *Logan*, 137 Cal. App. 2d 331, 333, 290 P. 2d 11, 12 (Ct. App. 1955) (*McCue*). Thus the Virginia Supreme Court's refusal of appellants' petition for appeal is reviewable in this Court as a final judgment of "the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. *See Matthews* v. *Huwe*, 269 U.S. 262, 265 (1925); *Martin* v. *City of Struthers*, 319 U.S. 141, 142 n.2 (1943); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 231-232 (1969); *id.* at 243-244 (Harlan, J., dissenting); *Tumey* v. *Ohio*, 273 U.S. 510, 515 (1927); *Hetrick* v. *Village of Lindsey*, 265 U.S. 384, 386 (1924).

necessarily rejected appellants' constitutional objections to orders excluding the public and the press from entire criminal trials under the circumstances of this case.[17] Moreover, in dismissing appellants' petitions for writs of mandamus and prohibition, again on the authority of *Gannett*, J.S. at 2a-5a, the court below also exercised its original jurisdiction to rule on the merits against appellants' constitutional objections to Judge Taylor's closure order.[18] All three judgments are final and reviewable in this Court by appeal or by certiorari.[19]

[17]The explicit reliance on *Gannett* by the court below, J.S. at 1a, further demonstrates, in the circumstances of this case, that the federal constitutional claims pressed by appellants were disposed of on their merits. *See Oregon* v. *Hass*, 420 U.S. 714, 719-720 (1975) (fact that state courts found it necessary to attempt to distinguish a decision of this Court enunciating federal constitutional principles reveals federal basis of state courts' decisions). *Cf.* n.11 *supra*.

[18]The Virginia Supreme Court has original jurisdiction in cases of mandamus and prohibition, among others. Va. Const. art. VI, § 1; Va. Code § 17-96; Va. S. Ct. Rule 5:5. *Cf. Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175-176 (1803).

[19]As to the judgments of the court below dismissing appellants' petitions for writs of mandamus and prohibition, the Virginia Supreme Court was not only the "highest court . . . in which a decision could be had," 28 U.S.C. § 1257; it was the *only* court. *See, e.g.*, *Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954) (reviewing denial of writ of prohibition); *Michigan Central Railroad Co.* v. *Mix*, 278 U.S. 492, 494 (1929) (same); *Hartman* v.

IV. Conclusion.

For the foregoing reasons, the Motion to Dismiss should be denied and this Court should note probable jurisdiction or, alternatively, should treat "the papers whereon the appeal was taken . . . as a petition for writ of certiorari . . . duly presented to the Supreme Court at the time the appeal was taken," 28 U.S.C. § 2103, and should grant certiorari.

Respectfully submitted,

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Greenhow, 102 U.S. 672, 676 (1881) (reviewing Virginia Supreme Court's denial of writ of mandamus).

The government has not suggested in this Court or in opposing the appeal below any nonfederal ground on which any of the three judgments of the Virginia Supreme Court could be upheld without reaching the federal questions presented here. Indeed, no such ground could be suggested, for none was relied upon by the Virginia Supreme Court, and it is settled that the theoretical possibility that some independent and adequate nonfederal ground might have been available, *see* Motion at 7, cannot relieve "this Court of the necessity of considering the federal question[s]" decided below. *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 630-631 (1973); *see California* v. *Byers*, 402 U.S. 424 (1971); *Beecher* v. *Alabama*, 389 U.S. 35, 37 n.3 (1967) (per curiam); *Evans* v. *Newton*, 382 U.S. 296, 302 (1966). *Cf. Gannett*, 99 S.Ct. at 2903-2904.